



BEFORE THE MONTGOMERY COUNTY ETHICS COMMISSION

Advisory Opinion [Denied Waiver Request] No. 09-08-009

The ethics law prohibits an employee from accepting a gift from anyone who is a registered lobbyist on a matter that is, or could be, considered by that employee's agency. A councilmember asks whether he can participate in a program developed by Barwood Taxi where councilmembers would record public service announcements (PSA) that would appear on small video terminals in the back seats of Barwood cabs. The Commission concludes that the councilmember cannot participate in this program because it constitutes a prohibited gift from an interested donor.

Barwood is installing small video terminals in the back seats of its taxicabs. While the primary purpose of these terminals is to permit passengers to pay by credit card, the terminals can also display videos. Barwood is working with local nonprofits, such as the Montgomery County Mental Health Association and NIH Children's Charities, to "air" short PSAs on these terminals. In order to promote the County as an excellent place to live, work, and play, Barwood is proposing that councilmembers appear in 15-30 second videos asking trivia questions about the County. The questions would cover a variety of facts about the County, which would inform residents and promote the County to business travelers.

Section 19A-16(c) provides that an employee cannot accept a gift from an "interested donor." An interested donor includes anyone who is registered on a matter that is or could be considered by the employee's agency. § 19A-16(c)(1). The first question is whether Barwood is an interested donor.

There can be no question that Barwood Taxi is an "interested donor" as far as the County Council is concerned. Barwood Taxi is the largest operator of taxicabs in Montgomery County. The County Council has enacted comprehensive laws regulating the taxicab industry, presently codified in Chapter 53 of the County Code. Ethics Commission records reflect that Barwood employs two law firms to act as lobbyists on taxicab legislation and other taxicab issues. In addition, Barwood Taxi President Lee Barnes is himself registered as a lobbyist for the "Coalition for a Competitive Taxicab Industry, Inc." to lobby on taxicab legislation and regulation.

The next issue is whether Barwood's offer to allow a councilmember to record a PSA to be shown in its taxicabs amounts to a gift. The ethics law defines a gift as "the transfer of anything of economic value, regardless of form, without an exchange of consideration of at least equal value." § 19A-4(h).¹ While the information provided to the Commission does not indicate whether Barwood

¹ A gift does not include a transfer regulated by state or federal law governing political campaigns or elections. But the opportunity to appear in a PSA is not a campaign contribution. *See, e.g.,* Md. Code. Ann., Elec. Law § 1-101(o) defining a contribution as a gift "to promote or assist in the promotion of the success or defeat of a candidate, political party, or question."

also intends to sell advertising on its video terminals (in addition to airing PSAs), the Commission concludes that Barwood's offer does have economic value. It is, in essence, free advertising.

On the other hand, the Commission concludes that Barwood's offer would not violate § 19A-14(a), prohibiting the intentional use of prestige of office for private gain or the gain of another, or § 19A-14(b), prohibiting the use of an official County or agency title or insignia in connection with any private enterprise. The use of councilmembers in PSAs, as described here, does not appear to be an effort to market Barwood taxicabs. As a practical matter, a Barwood customer would see the PSA only after he or she has already made the choice to use a Barwood taxicab.

Lastly, the employee asks for a waiver, should the Commission conclude that one is necessary. There are three different waiver standards in the ethics law, the application of which depends upon the prohibition to be waived. In this case, the waiver standard set out in § 19A-8(a) applies. Of the three waiver standards in the ethics law, this is the most stringent. It provides that the Commission may grant a waiver if it finds the following three criteria are met:

- (1) the best interests of the County would be served by granting the waiver;
- (2) the importance to the County of a public employee or class of employees performing official duties outweighs the actual or potential harm of any conflict of interest; and
- (3) granting the waiver will not give a public employee or class of employees an unfair economic advantage over other public employees or members of the public.

The waiver standard is not met.² The importance to the County of a public employee or class of employees performing official duties does not outweigh the actual or potential harm of any conflict of interest. While the ostensible purpose of this program may be the promotion of Montgomery County, Barwood has chosen which County employees will appear in these PSAs to promote the County. And the employees it has chosen are the same employees that write the laws regulating Barwood's taxicab industry.

In reaching this decision the Commission has relied upon the facts as presented by the requester.

FOR THE COMMISSION:



September 21, 2009

Date

Antar Johnson, Chair

² Typically, employees seek waivers of either the conflict of interest provisions (§ 19A-11) or the post-County employment provisions (§ 19A-13). Far less common is the situation presented here—a waiver of the prohibition against accepting gifts under § 19A-16(c).